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Supreme Court, U.S.
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No. (1)

In The
Supreme Court of the United States

Roy Michael Brauninger
Petitioner

versus

Default Management Solutions, LLC
and W. David Motes
Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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March 19, 2008

QUESTION PRESENTED

Was the district court correct when, in a motion for summary judgment, it first considered and rejected a self-serving declaration of the employer under the business records rule when, by its own terms, the business record was prepared specifically in anticipation of litigation and lacked the required indicia of reliability according to *Palmer v. Hoffman*, 318 U.S. 109, 63 S. Ct. 447, 87 L.ED. 645 (1943)? On rehearing, when the maker of the self-serving declaration subsequently asserted that she was in good faith, the District Court reversed itself and considered the document under the business records exception. But for consideration of that business record, the motion could not have been granted.

PARTIES TO THE PROCEEDINGS BELOW

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TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS 1

STATEMENT 2

A. Procedural History and Summary of the Issues. 2

B. Statement of Facts. 4

SUMMARY OF ARGUMENT 7

ARGUMENT 8

CONCLUSION 11

APPENDICES

APPENDIX A, Opinion of the Fifth Circuit, filed December 20, 2007 ..... 1a

APPENDIX B, Initial Opinion of the District Court, filed November 22, 2006 ..... 17a

APPENDIX C, Opinion of the District Court Reversing its Original Decision, filed January 16,2007 ..... 45a

APPENDIX D, Business Record in Dispute, Investigation Notes of Amy Williamson, dated May 4, 2004 ..... 51a

TABLE OF AUTHORITIES

Cases

Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 112 S.Ct. 2072 (1992) 3, 7

Palmer v. Hoffman, 318 U.S. 109, 63 S. Ct. 447, 87 L.ED. 645 (1943)...i-3, 6, 8, 10, 11, 20

U.S. v. Stone, 604 F.2d 922 (5th Cir. 1979) 19

Washington v. Armstrong World Industries, Inc., 839 F.2d 1121 (5th Cir. 1988) 5

Yarog v. USDA, 53 F.3rd 728 (5th Cir. 1995) 1

Other Authorities

28 U.S.C. § 1254(1) 1

PETITION FOR WRIT OF CERTIORARI

Petitioner Roy Michael Brauninger respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unpublished (Appendix A). The district court's initial Order and Reasons granting in part and denying in part Respondent Default Management Solutions, L.L.C., d/b/a Default Management Loss Mitigation Services's Motion for Summary Judgment and denying Respondent W. David Motes's Motion for Summary Judgment also is unpublished (Appendix B). The district court's Order and Reasons granting Respondent W. David Motes's Motion to Reconsider Ruling Regarding Motion for Summary Judgment and dismissing all claims with prejudice, which reversed the Court's position in Appendix B, is also unpublished (Appendix C).

JURISDICTION

The opinion of the court of appeals was filed on December 20, 2007 (Appendix A). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Petitioner does not ask this Court to determine the constitutionality of a statutory provision or review and underlying decision based on a statutory provision.

Rather, Petitioner asks this Court to review and interpret its 61-year-old decision in *Palmer v. Hoffman*, 318 U.S. 109, 63 S. Ct. 447, 87 L.ED. 645 (1943).

STATEMENT

A. Procedural History and Summary of the Issues.

Petitioner Michael Brauninger (Brauninger) filed his complaint on March 2, 2005, which was answered by Respondent David Motes (Motes) on May 9, 2005 and Respondent Default Management Solutions, LLC (hereafter, Default Management) on July 5, 2005. Default Management is in the business of attempting to keep defaulting homeowners in their house. After extensive discovery, Defendants filed their Motions for Summary Judgment on August 8, 2006. On September 1, 2006, Brauninger filed his Opposition and four days later, on September 5, 2006, filed his Motion to Strike Inadmissible Evidence.

In his Motion to Strike, Brauninger argued that Defendant's Motion for Summary Judgment was based almost entirely on the "investigative notes" by Amy Williamson.

Federal Rule of Civil Procedure 56(c) expressly allows use of properly-authenticated discovery documents in Motions for Summary Judgments. However, inadmissible statements within the discovery documents, hearsay, conclusions, etc., are as objectionable as they would be at trial.

Plaintiff argued that the 7-page, single-spaced writing which Defendants rely upon so heavily, to the virtual exclusion of other supporting admissible evidence, is itself rank self-serving hearsay, undeniably prepared strictly in anticipation of litigation and therefore inadmissible under standards set by this Court in *Palmer v. Hoffman*, 318 U.S. 209.

Plaintiff moved to strike references to Amy Williamson's letter of termination, the Declaration of Judy Ellison, and Judy Ellison's letter to Brauninger about her appeal investigation, which plaintiff argued, was simply a rehash of inadmissible evidence contained in Amy Williamson's self-serving declaration and her "investigative notes." As such they were hearsay within hearsay and absolutely not admissible in a summary judgment proceeding. All of these documents, particularly the Declaration of Judy Ellison, were prepared in anticipation of litigation. Ellison stated openly that she relied on the notes of the investigation prepared by Amy Williamson.

On November 22, 2006, the district court entered its Order denying Brauninger's well-founded Motion to Strike, granted in part and denied in part Defendant Default Management's Motion for Summary Judgment, and rightly denied Defendant Motes's Summary Judgment Motion in its entirety. In this decision, the district court tried the merits of Brauninger's discrimination case, made repeated credibility decisions and habitually viewed the evidence in the light most favorable to the moving party despite the dictates of *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 456, 112

S.Ct. 2072, 2077 (1992). Review on these matters are not sought in this appeal.

First, the district court determined that "the inquiry is simply whether the persons who decided...to terminate Plaintiff had a good faith belief in the truthfulness of the information gained from the investigation..."

The district court dismissed Brauninger's discrimination claims out of hand. However, the Court initially kept alive Brauninger the defamation action against Motes and stated that Default Management "may well be liable if the Court determined that Motes was acting in the scope and course of his employment."

Defendant Motes then moved for reconsideration. Specifically, Motes re-addressed the issue of damages and introduced *only at this late stage,* self-serving, speculative affidavits from individuals in the employ of Default Management who all claimed that Brauninger ***would have been*** fired even absent Motes's defamatory statements. The Court swallowed these affidavits whole, reversed itself and threw out Brauninger's remaining defamation action against Motes.

This appeal followed.

B. **Statement of Facts.**

Brauninger had come to Default Management with a thirty-year history of responsible management in his job at Louisiana Gas & Service Company, now

ATMOS Energy. His supervisor at Default Management, Mike Roniger, had hired him to "clean house" and restore efficiency to Default Management's largely minority-staffed New Orleans operation. Brauninger did as he was told and was awarded an eight percent (8%) raise on or about January, 2004.

Later that same morning Ms. Amy Williamson (Williamson), HR manager for Default Management, abruptly informed Brauninger, for the first time, that he was being investigated for "sexual harassment." Brauninger was shocked to the point of speechlessness. That same day, after a hurried investigation that *only* included interviews of employees Brauninger had recently disciplined, and of Defendant David Motes, whom Brauninger had both beaten out of a job and then demoted, Williamson terminated Brauninger. From information appearing in her report Williamson knew that virtually all the bad information concerning Brauninger had originated from David Motes and from Motes only; she was aware that this information had been spread around by Motes to individuals whom Brauninger had disciplined.

Amy Williamson terminated Brauninger that same day despite the fact that:

1) no employee had ever come forward to complain to Rick Roniger, Default Management's senior administrator who worked in the same office with Brauninger in New Orleans,

2) that Brauninger vigorously had denied the accusations and had pointed to specific individuals who could prove his innocence and

3) that Default Management had a strong progressive discipline policy which reserved immediate termination only for infractions such as workplace violence.

The managerial impetus to terminate Mike Brauninger, a White male in his early fifties, came exclusively from Amy Williamson, a White female in her thirties weighing almost three hundred pounds and a graduate of Baylor University in Waco, Texas. Williamson had only recently announced to a surprised group of company newcommers that she thought it might be of interest to them that she had been married to a Black man, and to an Hispanic man, and had children by them.

For the Court's general information the allegations in Brauninger's lawsuit were these:

1) that a well-defined and active group of malcontents harboring unjustified resentment against Brauninger existed at Default Management,

2) that Default Management's office was over 80% African-American and minority and that the numbers of Caucasians working in that office had been declining for weeks and months,

3) that when Brauninger was investigated, Amy Williamson took care *only* to interview David Motes, Angelica Jeter, Monique Simms, Lee Lebeaud, Judy Lewis, and Nancy Stroebel, despite Brauninger's pleas to the contrary,

4) that when Brauninger requested an appeal, none of the witnesses Brauninger named were contacted, and instead, recourse was again made only to people harboring known animosity toward Brauninger,

5) that Brauninger never had any form of discussion or interview with Williamson until she came to Default Management's office to fire him, and in fact, the first time Brauninger had heard Amy Williamson speak was at a workshop seminar and

6) that Brauninger was regarded as an "old man" and was replaced by two younger, less-qualified minorities.

Defendant Motes began telling any and all individuals who would listen that Brauninger sexually harassed his subordinates. The investigation followed.

SUMMARY OF ARGUMENT

This Case presents a question often encountered by practitioners but apparently not addressed by the

Supreme Court since 1943: When does a business record have "indicia of reliability"? In this case the "investigative report" relied upon exclusively by the defendant, the trial court and the appeals court was undeniably prepared after Plaintiff threatened to sue Amy Williamson personally and Default Management Solutions. The truth of all facts and conclusions contained in this business record prepared in anticipation of litigation were accepted without question by both the trial and reviewing courts.

Not one shred of evidence was put forth by Defendants in its motion for summary judgment other than what Amy Williamson wrote in her "Report" (Appendix D), after she learned that Brauninger would be bring a lawsuit against her.

On this slender thread the trial court reversed itself and threw out Brauninger's lawsuit. The Court below accepted at face value a post-facto, self-serving affidavit from an interested party on an ultimate question of fact and used that as the basis for dismissing Brauninger's retaliation/defamation claims.

ARGUMENT

By failing to strike the self-serving report prepared by Amy Williamson after she had already terminated Brauninger and after she had learned of Brauninger's intention to sue, the courts below committed reversible error according to *Palmer v. Hoffman*, 318 U.S. 109.

In support of its Motion for Summary Judgment, Default Management submitted the self-serving declaration of Amy Williamson as well as so-called investigation notes. In this lawsuit, Plaintiff claims that Amy Williamson fired him for an impermissible reason, namely animus toward his race and gender. Williamson's sole support for the statements made in her self-serving affidavit are the supposedly contemporaneous notes in a writing styled, "Complaint of Sexual Harassment Against Mike Brauninger 5/4/04, Investigator: Amy Williamson," a 7-page, single-spaced document (Appendix D).

In her affidavit, Williamson claims that she created the notes contemporaneous with her investigation. Internal evidence, however, clearly shows that the 7-page, single-spaced document produced by Williamson is anything but a contemporaneous record of present-sense impressions; instead, it was, and is, a document prepared in anticipation of litigation.

On Appendix D at page 69a, Williamson states at the last paragraph:

> He [Mike] told Joe *he [Mike] was planning to sue*...I told him that I knew he was saying more than that, and *since he had also threatened to sue us,* we could no longer discuss this matter with him.

She also states, on page 63a, that she learned through Motes that Brauninger had told Steve Johnson

that he (Brauninger) was going to "sue the shit out of everyone" up here that was involved (Appendix D).

Federal Rule of Civil Procedure 56(c) expressly allows use of properly-authenticated discovery documents in Motions for Summary Judgments. However, inadmissible statements within the discovery documents, hearsay, conclusions, etc., are as objectionable as they would be at trial.

This Court has not spoken concerning trustworthiness of statements signed in the regular course of business for over sixty years, *Palmer v. Hoffman*, 318 U.S. 109, 63 S. Ct. 447, 87 L.ED. 645 (1943), where in a diversity case, the Court was called upon to rule in the admissibility of affidavits from railroad employees regarding a serious grade crossing accident.

There are over seven hundred reported decisions which cite *Palmer*, but there has been no further guidance from this Court on its implementation. At a minimum, such guidance could include the situation where the report in question was prepared after learning of an intent to sue, and whether the report, by its nature, was routine or specific to a particular event. The facts of this case will allow the court to revisit the topic and put into place more helpful and more specific guidelines.

In this case Amy Williamson was not simply preparing another factual report about alleged sexual harassment which *might* result in litigation, she was writing a report justifying a decision to terminate

which had already been made. Williamson made the decision to fire Brauninger on May 4, 2004, and although the report is dated May 4, 2004, internal evidence in the document itself (Apppendix D) reveals that it was not prepared until after Wednesday, May 5, 2004, when Williamson had gotten word from a subordinate that Brauninger was planning to sue, and after Williamson had personally called Brauninger to him that she knew he was planning to sue and would therefore not discuss his termination with him any further. Should all defendants have a similar option, any corporate wrongdoing could be investigated, blessed, and rendered impregnable to legal challenge by some amorphous and simple showing of a subjective "good faith".

At a minimum, it is apparent that the Fifth Circuit Court of Appeals and the district court have entirely ignored the commands of this Court in *Palmer*.

CONCLUSION

This document at issue in this case categorically fails to meet the standards set out in *Palmer v. Hoffman*, and should properly be excluded from evidence. The subsequent declaration that the report was made in "good faith" should not have been allowed to cure the *Palmer* defect. Because Default Management relied on this document almost exclusively in its motion for summary judgment, the district court's grant of summary judgment should be reversed.

This case presents to the Court an opportunity to review and recast national standards for the implementation of the business records rule, which it has not done for over sixty years.

Respectfully submitted,
/s/Dale E. Williams

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-30228 _____ (Filed 12/20/07)
Summary Calendar _____

ROY MICHAEL BRAUNINGER,
Plaintiff-Appellant,

v.

DAVID MOTES; DEFAULT MANAGEMENT SOLUTIONS, L.L.C.,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
No. 2:05-CV-688

Before REAVLEY, SMITH, and BARKSDALE, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

Michael Brauninger appeals a summary judgment in an employment discrimination and defamation suit he brought against David Motes and Default Management Solutions, L.L.C., now known as

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*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

First American Loss Mitigation Services ("FALMS"). Finding no error, we affirm.

I.

In March 2003 FALMS hired Brauninger as a manager with supervisory authority over numerous FALMS employees. Rick Roniger, an Executive Vice President and branch manager, and Amy Williamson, a Human Resources Manager, interviewed Brauninger, consulted with each other and jointly decided to offer Brauninger the position. At the time, Brauninger was a 50-year-old white male; Roniger was a 51-year-old white male; and Williamson was a white female in her thirties.

In April 2004, FALMS employee Angelica Jeter called the Human Resources Department to report sexually harassing comments allegedly made by Brauninger to Jodi Bougeouis, another FALMS employee under Brauninger's supervision. Two days later, Bougeouis called the Human Resources Department to complain.

Based on these complaints, Amy Williamson began investigating Brauninger's conduct. On May 4, 2004, Williamson interviewed multiple employees in that office, including Jodi Bougeouis, Angelica Jeter, Nancy Stroebel, Monique Simms, Lee Lebaud, Kim Schroeder, Judy Lewis, David Motes, and Brauninger. During the interviews, Williamson received first- and second-hand reports of sexual and racial comments made by Brauninger to co-workers and subordinates. These included Brauninger's description of an employee as a "nigger lover," sexual advances

Brauninger made to Jodi Bougeouis, Brauninger's express desire to hire a job candidate because of her breasts, and during a meeting with employees, his reference to a female client as "the bitch with big boobs," including illustrative hand gestures to emphasize the point.

On the day of the interviews, Williamson discussed the allegations with her Human Resources supervisor, Judy Ellison, and with Roniger. The three of them decided that Brauninger had violated FALMS' policy against sexual harassment, and they agreed to terminate his employment immediately.

On May 4, 2004, less than fourteen months after hiring Brauninger, FALMS fired him. Subsequently, Williamson recorded her findings and notes from the various interviews in a report, which noted that two employees related being told by Brauninger of his intention to "sue the shit out of everyone."

FALMS formally confirmed its decision to terminate Brauninger in a letter dated May 6, 2004, which also informed Brauninger that he could contest the termination through FALMS's "complaint resolution process." Brauninger appealed the termination decision through that process, claiming that he had not engaged in improper conduct and that the witnesses interviewed by Williamson were part of a conspiracy against him. Brauninger did not, at that point, claim age, race, or sex discrimination.

In response to the administrative appeal, Ellison conducted a second investigation of the complaints

against Brauninger. She interviewed some of the employees interviewed by Williamson in her initial investigation and other employees. Her investigation corroborated Williamson's, and she concluded that the decision to terminate Brauninger had been appropriate. Ellison recorded her findings in a report and in a letter sent to Brauninger on June 24, 2004.

Brauninger filed a claim with the EEOC alleging he was fired because of his age. The EEOC dismissed the claim, and Brauninger filed a federal age discrimination suit against FALMS, also raising state race and sex discrimination claims against FALMS and state defamation claims against FALMS and its employee Motes.

The district court granted FALMS's motion for summary judgment on the discrimination claims but denied FALMS's and Motes's motions for summary judgment on the defamation claims. The court later granted Motes's motion for reconsideration of the defamation claims and awarded Motes and FALMS summary judgment on those claims. Brauninger appeals the summary judgments and the admission of Williamson's and Ellison's affidavits, reports, and letters.

II.

Brauninger contends the district court erred by admitting into evidence Williamson's and Ellison's affidavits, their written reports, and their letters to Brauninger, who objects to the admission of all these documents on essentially two grounds—that they are unreliably "self-serving" and are based on inadmissible

hearsay. We review for abuse of discretion. *United States v. Anderson*, 933 F.2d 1261, 1267-68 (5th Cir. 1991).

The district court found that Williamson's and Ellison's affidavits complied with the requirements of 28 U.S.C. § 1746, were based on personal knowledge, and served to authenticate the reports and letters that accompanied them. The court thus found the affidavits sufficiently relevant and reliable. Although Brauninger dismisses the affidavits as containing merely "self-serving" assertions, he offers no specific reason to doubt that the affidavits are based on Williamson's and Ellison's personal knowledge regarding the conduct of their own investigations and employment decisions. Accordingly, the court did not abuse its discretion in admitting the affidavits.

Brauninger's principal complaint, however, regards the admission of Williamson's and Ellison's reports and letters. Williamson's report chronicles the steps in her investigation, the complaints she received, the witnesses she interviewed, statements made during those interviews, and the basis for the decision to terminate Brauninger. Her termination letter to Brauninger summarizes the findings of her investigation. Ellison's report likewise chronicles her own follow-up investigation, and her letter to Brauninger similarly summarizes her additional findings. The court admitted the reports and letters, finding that they contained non-hearsay and hearsay evidence admissible under the business records exception of Federal Rule of Evidence 803(6).

Although the reports contained statements made by FALMS employees to Williamson or Ellison during the course of their interviews, the district court correctly found that those statements are not hearsay. Because they were offered to prove what was said to Williamson and Ellison, and thus what Williamson and Ellison relied on in making the decision to fire Brauninger, the statements were not offered to prove the truth of the matters asserted.[1]

Although the statements of FALMS employees contained in the reports were not hearsay, the reports constitute out-of-court statements by Williamson and Ellison that are hearsay. Yet, the district court deemed the reports admissible under rule 803(6)'s exception to the hearsay exclusion. That rule allows the admission of "report[s] . . . made at or near the time by . . . a person with knowledge, if kept in the course of a regularly conducted business activity, . . . unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." FED. R. EVID. 803(6). The court correctly found that the reports were made at or near the time of the investigations, were based on Williamson's and

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[1]*See* FED. R. EVID. 801(c) (explaining that a statement is not hearsay if offered for a reason other than proving truth of the matter asserted). Brauninger takes issue with many of the accusations leveled against him by FALMS employees, and his brief implies that the alleged falsity of those accusations is a centerpiece of his suit. Because he was an at-will employee, however, the key issue is not whether the accusations were true but instead whether Williamson, Ellison, and Roniger relied on them—mistakenly or not—in making a nondiscriminatory decision.

Ellison's personal knowledge of their own investigations, and were the result of a regularly conducted business activity. As to the last of those findings, the court properly noted that the investigation and documentation of sexual harassment allegations are ordinary business practices and regular parts of Williamson's and Ellison's duties as human resource managers.[2]

Brauninger, however, argues that Williamson's and Ellison's reports fall under an exception to rule 803(6) for business records prepared in anticipation of litigation. Brauninger urges that before writing the reports, Williamson and Ellison knew of his intention to sue.

Although rule 803(6) does not refer to an exception for business records prepared in anticipation of litigation, the exception amounts to a corollary of rule 803(6)'s requirement that admissible business records result from a "regularly conducted business activity"—and thus not from the mere anticipation of litigation. Construing the statutory predecessor to rule 803(6), the Supreme Court held that a railroad's accident reports were inadmissible where "those reports are not for the systematic conduct of the enterprise as a railroad business" but rather "are calculated for use essentially in the court." *Palmer v. Hoffman*, 318 U.S. 109, 114 (1943). Applying *Palmer*,

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[2]*See La Day v. Catalyst Tech., Inc.*, 302 F.3d 474, 481 n.7 (5th Cir. 2002) (stating that human resource manager's harassment investigation notes were admissible as a business record).

this court has deemed reports inadmissible where their "primary utility" is for litigation. *Broadcast Music, Inc. v. Xanthas, Inc.*, 855 F.2d 233, 238 (5th Cir. 1988).

The district court correctly found that the primary purpose of Williamson's and Ellison's reports had little to do with any anticipated litigation by Brauninger. The harassment investigation was triggered by employees' sexual harassment complaints and not by Brauninger's subsequent threat to sue. In response to harassment complaints against Brauninger, it was an ordinary practice for human resource managers to investigate those complaints and to document the findings of that investigation.

Nor did the district court err in deeming the reports trustworthy. Admissibility of evidence under rule 803(6) "is chiefly a matter of trustworthiness." *Miss. River Grain Elevator, Inc. v. Bartlett & Co., Grain*, 659 F.2d 1314, 1319 (Former 5th Cir. Oct. 1981). Brauninger makes much of the fact that Williamson's report was written after the decision to terminate had already been made. Yet, although Brauninger frames the report as an *ex post facto* attempt to justify a firing decision, we do not agree that the timing of the report undermines its trustworthiness.

On May 4, 2004, shortly after receiving complaints against Brauninger, Williamson visited the FALMS office to conduct interviews. Upon interviewing the witnesses and learning of the seriousness of the allegations, Williamson determined

that Brauninger needed to be fired immediately.[3] Williamson conferred by phone with her supervisors, and Brauninger was terminated that day. Under the circumstances, it would not be reasonable to expect Williamson to refrain from terminating Brauninger until she had time to type up her notes into a formal report.

III.

Brauninger challenges the summary judgment on his discrimination and defamation claims. We review a summary judgment *de novo*, applying the same standards as did the district court. *Gowesky v. Singing River Hosp. Sys.*, 321 F.3d 503, 507 (5th Cir. 2003).

Summary judgment is appropriate if "there is no genuine issue as to any material fact." FED. R. CIV. P. 56(c). "If the moving party meets the initial burden of showing there is no genuine issue of material fact, the burden shifts to the nonmoving party to produce evidence or designate specific facts showing the existence of a genuine issue for trial." *Gowesky*, 321 F.3d at 507 (internal quotations and citation omitted). Although the summary judgment evidence is viewed in the light most favorable to the non-moving party, this may be done only "when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Little v. Liquid Air Corp.*, 37 F.3d

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[3]Indeed, FALMS may have been exposed to the prospect of title VII liability if it did not "correct promptly" the alleged sexual harassment. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

1069, 1075 (5th Cir. 1994) (en banc) (citations omitted). To establish that a genuine controversy exists, the nonmoving party must offer more than "conclusory allegations" and "unsubstantiated assertions." *Id.*

A.

Under the burden-shifting scheme of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973),[4] a plaintiff in an employment discrimination suit must first establish a *prima facie* case. *Okoye v. Univ. of Tex. Houston Health Sci. Ctr.*, 245 F.3d 507, 512 (5th Cir. 2001). Once established, the *prima facie* case raises a presumption of discrimination, which the employer can rebut by demonstrating a legitimate, nondiscriminatory reason for its action. *Id.* If the employer supplies a nondiscriminatory reason, the burden shifts to the plaintiff to show that the employer's reason either was a pretext for discrimination or was mixed with a discriminatory motive. *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004).

The district court assumed a genuine issue of material fact as to whether Brauninger could establish a *prima facie* case, but the court went on to find no issue as to the existence of a nondiscriminatory reason

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[4]Although Brauninger brings his race and sex discrimination claims under state law, Louisiana courts have observed "the commonality between federal and state anti-discrimination laws," and have approved the application of title VII's *McDonnell Douglas* doctrine to state discrimination claims. *Baldwin v. Bd. of Sup'rs for Univ. of La. Sys.*, 961 So. 2d 418, 422 (La. App. 1st Cir. 2007). We therefore consider Brauninger's age, race, and sex claims under the same rubric.

for FALMS's firing decision and the absence of pretext or mixed motive. We agree with the district court that Brauninger has not established a genuine issue of material fact regarding FALMS's reasons for terminating his employment.

Assuming Brauninger establishes a *prima facie* case, FALMS has met its summary judgment burden of demonstrating a legitimate, nondiscriminatory reason for firing him. Williamson's and Ellison's affidavits, reports, and letters suggest FALMS did so because of multiple allegations that Brauninger had sexually harassed employees and had created a hostile work environment in violation of company policies. Although Brauninger claims FALMS conducted a hasty investigation and relied on "hearsay witnesses who bore particular grudges" against him, he was an at-will employee whom FALMS could fire for any lawful reason or for no reason at all.

To survive summary judgment, FALMS need only show that it relied in good faith on allegations of Brauninger's misconduct—a nondiscriminatory reason for termination.[5] Brauninger points to no summary

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[5]"[E]ven an incorrect belief that an employee's performance is inadequate constitutes a legitimate, non-discriminatory reason. We do not try in court the validity of good faith beliefs as to an employee's competence." *Little v. Republic Refining Co.*, 924 F.2d 93, 97 (5th Cir. 1991); *see also Elliott v. Group Med. & Surgical Serv.*, 714 F.2d 556, 567 (5th Cir. 1983) (noting that the *McDonnell Douglas* doctrine is not "a device which permits the jury to examine an employer's reasons for discharge and determine that the employer's business judgment or policies do not appeal to its sensibilities").

judgment evidence disputing that FALMS relied in good faith on the various allegations—accurate or not—against him.[6] Failing to do so, Brauninger's persistent attempt to dispute the accuracy of those allegations is not relevant to his discrimination claim.

Because FALMS has met its summary judgment burden of providing a nondiscriminatory reason for firing Brauninger, the burden shifts to Brauninger to establish a genuine issue of material fact as to pretext or mixed motive. To survive summary judgment on either theory, Brauninger must offer competent evidence of discriminatory animus against him on account of his race, age, or sex. We agree with the district court that he has not done so.

Brauninger's brief points to three arguably relevant pieces of evidence of discriminatory animus against him, a white male in his early fifties. First, he offers the fact that over 80% of employees in FALMS's office were non-white minorities. Standing alone, however, this statistic does not amount to probative evidence of discrimination without accompanying

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[6]The only evidence of bad faith suggested in Brauninger's brief is his assertion, based solely on personal knowledge, that nobody else in that office had been fired for a "first offense" of employee misconduct during the fourteen months Brauninger worked there. Yet, Brauninger points to no specific examples, in the summary judgment record, of employees who were retained despite committing "first offenses" similar in seriousness to the harassment offenses he was alleged to have committed. Moreover, Brauninger concedes that FALMS's company policies warn that offenses involving sexual harassment "may subject an employee to immediate termination."

evidence that there is a "gross statistical disparity" between FALMS's workforce and a "qualified pool" of potential employees "presumptively eligible" for employment. *Anderson v. Douglas & Lomason Co.*, 26 F.3d 1277, 1290 (5th Cir. 1994). The summary judgment record contains no such evidence.

Second, Brauninger offers the fact that Williamson once told co-workers she had been married to black and hispanic men. Such comment, however, does not show racial animus against white men.

Third, Brauninger offers the fact that Roniger, who was one year older than Brauninger, had referred jokingly to himself, Brauninger, and another employee as "grey-haired men." Such stray remark, however, is not unambiguous evidence of animus, given that Roniger was referring to himself as well as to Brauninger.[7] Nor has Brauninger shown that the remark was related to, or proximate in time to, a specific employment decision.[8]

To defeat summary judgment, the evidence must be sufficient on its own to "support a jury verdict in the

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[7] *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 222 (5th Cir. 2001) (quoting *Wyvill v. United Cos. Life Ins. Co.*, 212 F.3d 296, 304 (5th Cir. 2000)) (explaining that to support an inference of animus, a stray remark must be "direct and unambiguous").

[8] *See Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655 (5th Cir. 1996) (requiring comments be related and proximate to employment decision).

nonmoving party's favor."[9] On the thin evidence offered by Brauninger, no reasonable jury could conclude that discriminatory animus motivated Brauninger's firing—indeed, a firing occurring little over a year after Brauninger was hired by the same people who fired him.[10] We therefore agree with the district court that Brauninger's discrimination claims do not survive summary judgment.

B.

Under Louisiana law, a claim for defamation must establish causation, or "resulting injury." *Costello v. Hardy*, 864 So. 2d 129, 140 (La. 2004). In other words, a defamation plaintiff "must show a 'but for' causal connection between the defendant's conduct and the injuries." *Kosmitis v. Bailey*, 685 So. 2d 1177, 1181 (La. App. 2d Cir. 1996). Brauninger contends that Motes spread false and defamatory statements about him and that those statements caused him to be fired. The district court dismissed Brauninger's defamation claims against FALMS and Motes because no reasonable jury could find that Motes's statements were a "but for" cause of Brauninger's termination. We agree.

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[9] 11 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56.13[2], at 146-47 (3d ed. 2007); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) ("If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.").

[10] *See Faruski v. Parsons S.I.P., Inc.*, 123 F.3d 315, 321 n.3 (5th Cir. 1997) (stating that the fact that same person hires and fires employee raises inference of nondiscriminatory motive for firing).

In his brief, Brauninger makes the unsupported assertion that "[a]ll damaging information concerning Mike Brauninger came from David Motes." Although Motes appears to have been a source of much gossip in the office, Williamson's report documents the sources relied on in confirming Brauninger's inappropriate comments. Nearly all were confirmed by firsthand accounts and not by rumors allegedly started by Motes: Stroebel claimed Brauninger suggested to her that he wanted to hire a job candidate because of her breasts; Bougeouis claimed Brauninger made multiple sexual advances to her, and she averred that Brauninger told her another employee was a "nigger lover;" Lee Lebeaud and Lewis claimed Brauninger referred to a client as "the bitch with big boobs" during an employee meeting they attended.

Moreover, Williamson, Ellison, and Roniger confirmed in affidavits that they would have terminated Brauninger based on these firsthand reports, regardless of any secondhand rumors started by Motes. Aside from the unsupported assertion in his brief, Brauninger has offered no summary judgment evidence suggesting that FALMS did not rely on these firsthand accounts in making its decision to terminate him.[11] As the district court also observed, Brauninger appears never to have probed the basis for the termination decision through discovery devices or depositions of FALMS employees.

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[11] *See Little*, 37 F.3d at 1075 (requiring more than "conclusory allegations" and "unsubstantiated assertions" to survive summary judgment).

Because Brauninger has not demonstrated a genuine issue of material fact with regard to causation, we need not reach the other elements of his defamation claim, nor need we address the issue of FALMS's vicarious liability for Motes's alleged defamation. Accordingly, the district court correctly granted summary judgment to FALMS and Motes on the defamation claim.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ROY MICHAEL BRAUNINGER	CIVIL ACTION
VERSUS	NO. 05-0688
DEFAULT MANAGEMENT SOLUTIONS, L.L.C. AND DAVID MOTES	SECTION N (3)

ORDER

Presently before the Court are: (1) the Motion to Strike Inadmissible Evidence filed by Defendant Default Management Solutions, L.L.C. , d/b/a First American Loss Mitigation Services ("FALMS") (Rec. Doc. No. 74); (2) the Cross-Motion to Strike Inadmissible Evidence filed by Plaintiff, Roy Michael Brauninger (Rec. Doc. No. 92); (3) FALMS' Motion for Summary Judgment (Rec. Doc. No. 46); and (4) Defendant W. David Motes' Motion for Summary Judgment (Rec. Doc. No. 47). IT IS ORDERED that FALMS' motion to strike is GRANTED IN PART and DENIED IN PART, and that Plaintiff's motion to strike is DENIED. IT IS FURTHER ORDERED that FALMS' motion for summary judgment is GRANTED IN PART and DENIED IN PART; Motes' motion for summary judgment is DENIED.

BACKGROUND[1]

Plaintiff has sued Defendant FALMS for race, gender, and age discrimination based on his termination from employment, on or about May 4, 2004. Plaintiff also has sued both FALMS and Defendant Motes for defamation.

Plaintiff, a white male, applied for employment with FALMS in 2003. Human Resources Manager Amy Williamson conducted one or more telephone interviews with Plaintiff and solicited reference information to be used in the interview process. Thereafter, following a personal interview with Rick Roniger, Executive Vice-President and Manager of the New Orleans branch office, Plaintiff was hired, and commenced employment with FALMS as a "Freddie Mac" client manager on or about March 17, 2003. At that time, Plaintiff was 50 years old. Roniger, also a white male, was 51 years of age; Williamson, a white female, was in her thirties.

At FALMS, Plaintiff supervised analysts and processors working to assist clients in avoiding foreclosure. On April 28, 2004, Angelica Jeter, a New Orleans FALMS employee, called the Human

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[1]Given the parties' familiarity with the factual background of this dispute, the Court will only provide a brief summary of certain pertinent facts. The parties' recitation of the relevant factual information can be found in the memoranda submitted in connection with their motions. See Rec. Doc. Nos. 46-2, 46-5, 47-2, 70-3, 70-4, 77-3, and 80 (motions for summary judgment), and 74-2, 84-2, 85-2, 87, 86, and 90-2 (motions to strike).

Resources Department, which is located outside of Louisiana, to report a co-worker's (Jodi Bourgeois) potential sexual harassment complaint against Plaintiff. Two days later, Bourgeois personally called the Human Resources Department to complain about Plaintiff. Based on these calls, Williamson decided to travel to the New Orleans office to investigate the matter.

After interviewing nine employees in the New Orleans FALMS office on May 3-4, 2004, including Jeter, Bourgeois, David Motes, and Plaintiff, Williamson discussed the results of those interviews by telephone with her supervisor, Judy Ellison, and Roniger, who was out-of-town at the time. It was decided that Plaintiff should be terminated immediately. Williamson informed Plaintiff of this decision mid-day on May 4th. Thereafter, Plaintiff received a letter from Williamson, dated May 6th, stating that her investigation revealed that Plaintiff had engaged in "inappropriate conduct and conversations with [his] former subordinates in both privately held conversations and during a departmental meeting" that had "created an offensive, hostile working environment," and warranted immediate termination.[2] Williamson's May 4, 2004 notes from her interviews further state that the persons she had interviewed were uncomfortable with Plaintiff's actions, and that those actions had placed

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[2] *See* May 6, 2004 Williamson Letter to Brauninger, Exhibit 6 to FALMS' Memorandum in Support of Motion for Summary Judgment ("FALMS Mem.").

FALMS at risk.[3] Thus, FALMS "had no choice" but to terminate Plaintiff.[4]

Plaintiff denies that he acted or spoke in a sexually harassing manner with respect to any of his former subordinates. He responds that the persons interviewed, except Bourgeois, had been disciplined in some manner by him and were "malcontents harboring resentment toward him."[5] He additionally points to Motes – who also had interviewed for the position for which Plaintiff ultimately was hired, and later was demoted by Plaintiff – as the origin of most of the "bad information" about him.[6] Except with respect to Bourgeois, Plaintiff essentially contends that the other employees told Williamson negative things about him because they were unhappy with his discipline and/or demotions of them.[7] Plaintiff further maintains that FALMS' stated reason for his termination is false, and that he actually was terminated because of gender, race, and/or age discrimination.

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[3]*See* Williamson's notes entitled "Complaint of sexual harassment against Mike Brauninger 5/5/04" ("Investigation Notes"), Exhibit 5A to FALMS' Mem., at FALMS000232.

[4]*Id.*

[5]*See* Plaintiff's Opposition to Defendant's Motion for Summary Judgment ("Plaintiff's Opp.) at 3.

[6]*Id.*

[7]Plaintiff has no explanation for Bourgeois's motivation to say allegedly untrue things about him. He contends that, give the nature of and differences in their employment positions, they actually had very little interaction.

LAW AND ANALYSIS

I. Motions to Strike

A. FALMS' Motion to Strike

FALMS asks the Court to strike ¶¶3, 28, and 30 of Plaintiff's August 20, 2006 Declaration, Exhibit 1-A to his Opposition, on grounds that Plaintiff lacks personal knowledge with respect to the matters asserted therein. These statements are as follows:

> 3. I submitted my resume online to First American. I was contacted by Amy Williamson and had two brief phone conversations with her. She scheduled a personal interview for me with Rick Roniger. The interview lasted between an hour to two hours. I was hired on Rick Roniger's recommendation. I never physically met Amy Williamson at that time.

FALMS asserts that, as a job applicant, Plaintiff had no knowledge of whorecommended him for the position for which he ultimately was hired. On the showing made, and for purposes of the pending motions for summary judgment, FALMS' motion to strike is DENIED with respect to ¶3. The Court understands there to be no significant dispute that Williamson had initial telephone conversations with Plaintiff, and then arranged for Plaintiff to have a "face-to-face" interview with Roniger. Thus, based on the limited information that the parties have provided the Court on the issue, it appears that Williamson recommended that Plaintiff proceed to the next step

of the interview/hiring process, and that Roniger, after interviewing Plaintiff, was of the opinion that Plaintiff should be hired. As the applicant, it is not unlikely that Plaintiff became aware of this information as part of the hiring process. On these facts, the Court finds no harm in allowing Plaintiff to characterize Roniger's actions as "recommending" that he be hired. In any event, the Court does not find the issue to be particularly significant in resolving the pending motions for summary judgment.

> 28. I went to Williamson's boss, Judy Ellison, to appeal my termination. Ms. Ellison did not speak to anyone different from Williamson.

Ellison has stated that she interviewed three analysts not previously interviewed by Williamson. Plaintiff apparently disagrees. FALMS asserts that Plaintiff has no personal knowledge with respect to whom Ellison did or did not interview as part of her consideration of Plaintiff's appeal of his termination. The Court agrees and, therefore, strikes the second sentence of ¶28.

> 30. I went to the EEOC. Margaret Heist, a white female in her fifties, accompanied me to the EEOC because she had also been terminated and was replaced by two young men, one in his mid-twenties and on in his early thirties. I understand that William Price, a 25-year-old white male, and Kim Schroeder, a 32-year old white female, took over my position. I informed the EEOC of this, and the EEOC made my claim an age discrimination claim.

FALMS objects to Plaintiff's assertions regarding Price and Schroeder, contending that he has no personal knowledge of who took over his job duties. To the extent that the statement is offered to demonstrate that these individuals in fact assumed Plaintiff's job duties, the motion is GRANTED.[8] Plaintiff has not demonstrated that he has personal knowledge of his replacement(s).[9]

Asserting that 28 U.S.C. §1746 contemplates submission of a written document, FALMS also seeks to strike Plaintiff's Oral Declaration, Exhibit 1-B to his Opposition, in its entirety. Under the present rules and statutes, the Court declines to treat Plaintiff's oral declaration as a declaration satisfying the requirements of 28 U.S.C. §1746. Thus, this aspect of FALMS' motion is GRANTED. The Court notes, however, that Plaintiff's August 20, 2006 written declaration contains most, but not all, of the statements contained in his oral declaration. If Plaintiff would like to supplement his written

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[8]To the extent that the Plaintiff simply states what his understanding is about his replacement, Plaintiff certainly has personal knowledge of that information. It is not clear, however, that the mere fact of Plaintiff's understanding of the identity of his replacement(s) has any legal relevance.

[9]The Court notes that Amy Williamson's Declaration states that the majority of Plaintiff's job duties, particularly overseeing and supervising the analysts, were assumed by Craig Wenk. According to Williamson, Kim Schroeder did serve as a supervisor of the processors after Plaintiff's termination. See Williamson's July 28, 2006 Declaration, ¶¶ 9-10, Exhibit 5 to FALMS' Mem.

declaration to include the additional statements, or affix the statements and signature required by §1746 to a transcription of the oral declaration, the Court shall allow him seven (7) working days from entry of this Order to do so.

B. Plaintiff's Cross Motion to Strike Inadmissible Evidence

Plaintiff asks the Court to strike: (1) Williamson's Declaration, (2) Williamson's May 4, 2004 investigative notes, (3) Plaintiff's termination letter from Williamson, (4) Ellison's Declaration, and (5) Ellison's letter to Plaintiff regarding her appeal investigation. These documents are Exhibits 5, 5-A, 6, 7, and 8 to FALMS' memorandum in support of its motion for summary judgment.

Plaintiff's motion is DENIED. The two declarations comply with the requirements of 28 U.S.C. §1746, are based on personal knowledge, and serve to authenticate and to verify the documents attached to them. The investigative notes and the letters qualify as business records under Rule 803(6) of the Federal Rules of Evidence, and were prepared near or at the time of the investigations.

Nor does the reference to possible litigation in Williamson's notes somehow render them inadmissible. There is no dispute that one of Williamson's duties as Human ResourcesManager was to investigate complaints of possible sexual harassment. Recordation of the course and results of those investigations, including a reference to possible litigation, in the form

of investigative notes is not an unusual or unreasonable practice for personnel charged with this task, and likewise does not render the information contained therein inadmissible.

With regard to the statements by other FALMS employees that are recorded in Williamson's and Ellison's notes, and are being offered against Plaintiff, those statements are nonhearsay to the extent that they are simply offered as evidence of what was said to Williamson and Ellison. Insofar as they are offered solely for the purpose of establishing a legitimate and nondiscriminatory reason for Plaintiff's termination, as will be discussed in connection with FALMS' motion for summary judgment, this is the only function that they serve.

II. Motions for Summary Judgment

A. Summary Judgment Standard

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c). The materiality of facts is determined by the substantive law's identification of which facts are critical and which facts are irrelevant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505,

2510, 91 L. Ed.2d 202 (1986). A fact is material if it "might affect the outcome of the suit under the governing law." Id.

If the dispositive issue is one on which the nonmoving party will bear the burden of proof at trial, the moving party may satisfy its summary judgment burden by merely pointing out that the evidence in the record contains insufficient proof concerning an essential element of the nonmoving party's claim. See Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986); see also Lavespere v. Liberty Mut. Ins. Co., 910 F.2d 167, 178 (5th Cir. 1990). Once the moving party carries its burden pursuant to Rule 56(c), the nonmoving party must "go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex, 477 U.S. at 324, 106 S. Ct. 2553; see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed.2d 538 (1986); Auguster v. Vermillion Parish School Bd., 249 F.3d 400, 402 (5th Cir. 2001).

When considering a motion for summary judgment, the Court views the evidence in the light most favorable to the nonmoving party, Gillis v. Louisiana, 294 F.3d 755, 758 (5th Cir. 2002), and draws all reasonable inferences in favor of that party. Hunt v. Rapides Healthcare System, L.L.C., 277 F.3d 757, 764 (2001). Factual controversies are to be resolved in favor of the nonmoving party, "but only when there is an actual controversy, that is, when both

parties have submitted evidence of contradictory facts." Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir.1994) (citations omitted). The Court will not, "in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts." See id. (emphasis in original) (citing Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888, 110 S. Ct. 3177, 3188, 111 L. Ed.2d 695 (1990)).

Although the Court is to consider the full record in ruling on a motion for summary judgment, Rule 56 does not obligate it to search for evidence to support a party's opposition to summary judgment. Malacara v. Garber, 353 F.3d 393, 405 (5th Cir. 2003) ("When evidence exists in the summary judgment record but the nonmovant fails even to refer to it in the response to the motion for summary judgment, that evidence is not properly before the district court."). Thus, the nonmoving party should "identify specific evidence in the record, and articulate" precisely how that evidence supports his claims. Forsyth v. Barr, 19 F.3d 1527, 1537 (5th Cir.), cert. denied, 513 U.S. 871, 115 S. Ct. 195 (1994).

The nonmovant's burden of demonstrating a genuine issue is not satisfied merely by creating "some metaphysical doubt as to the material facts," "by conclusory allegations," by "unsubstantiated assertions," or "by only a scintilla of evidence." Little, 37 F.3d at 1075. Rather, a factual dispute precludes a grant of summary judgment only if the evidence is sufficient to permit a reasonable trier of fact to find for the nonmoving party. Smith v. Amedisys, 298 F.3d 434, 440 (5th Cir. 2002).

B. Discrimination

Under the burden shifting regime articulated by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the plaintiff must first establish a prima facie case of discrimination. Abarca v. Metro. Transit Auth., 404 F.3d 938, 941 (5th Cir. 2005); Okoye v. Univ. of Tex. Houston Health Science Ctr., 245 F.3d 507, 512 (5th Cir. 2001). Once established, the prima facie case raises a presumption of discrimination, which the defendant must then rebut by demonstrating a legitimate, nondiscriminatory reason for its actions. Okoye, 245 F.3d at 512. If the defendant satisfies this burden, the presumption disappears, and the plaintiff must show that the defendant's reason is a pretext for discrimination. Id.

With regard to pretext, the "mixed-motives" approach applies when a plaintiff argues that discrimination was a motivating factor, if not the sole motivating factor, for the defendant's actions. Thus, a plaintiff seeking to rebut an employer's legitimate, nondiscriminatory reason for an employment action must "offer sufficient evidence to create a genuine issue of material fact that (1) the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) the defendant's reason, while true, is only one of the reasons for its conduct, and another motivating factor is the plaintiff's protected characteristic (mixed-motives alternative)." See Rachid v. Jack in the Box, Inc., 376 F. 3d 305, 310-313 (5th Cir. 2004) (internal citations omitted); see also Desert Palace, Inc. v. Costa, 539 U.S. 90, 123 S. Ct. 2148 (2003). Under appropriate circumstances, "a

plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification [for the adverse employment action at issue] is false, may permit the trier of fact to conclude that the employer unlawfully discriminated" against the plaintiff. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 148, 120 S. Ct. 2097, 2109 (2000).

If the plaintiff carries his burden of presenting a genuine issue of material fact as to pretext, or that his protected characteristic was a motivating factor for the adverse action, the defendant, to defeat the plaintiff's claim, must show that the same action would have been taken regardless of the impermissible motivating factor. Rachid, 376 F.3d at 312-13. The employer's final burden is effectively that of proving an affirmative defense. Richardson v. Monitronics Int'l, Inc., 434 F.3d 327, 333 (5th Cir. 2005).

A plaintiff makes a prima facie case for discrimination by proving that (1) he is a member of a protected class; (2) he was qualified for the position; (3) he suffered adverse employment action; and (4) he was replaced by someone outside the protected class or, with disparate treatment, that others similarly situated were treated more favorably. Abarca, 404 F.3d at 941; Okoye, 245 F.3d at 512-13 (citing Shackelford v. Deloitte & Touche, LLP, 190 F.3d 398, 404 (5th Cir.1999)). Here, Plaintiff offers very little discussion of a prima facie case in his opposition memorandum. Indeed, with regard to his race discrimination claim, there is no suggestion that Plaintiff was replaced by someone of a different race. Rather, the persons that Plaintiff contends assumed his supervisory duties are

white. With regard to his age and gender discrimination claims, the parties disagree whether William Price, who is in his twenties, or Craig Wenk, who is in his fifties, assumed supervision of the analysts. All agree, however, that both Price and Wenk are male. And, although Price is much younger than Plaintiff, Plaintiff's declaration, as stated above, does not establish his personal knowledge of Price's assumption of these duties. Nor does his opposition point to admissible evidence in support of this assertion. On the other hand, it is undisputed that Schroeder, a white female in her early thirties, began supervising the processors after Plaintiff's termination.

In any event, the Court assumes, for purposes of considering FALMS' motion, that Plaintiff can establish a prima facie case. FALMS' assertion that Plaintiff was terminated based on a finding that he had engaged in "inappropriate conduct and conversations with [his] former subordinates in both privately held conversations and during a departmental meeting" constitutes a legitimate non-discriminatory reason for the termination. Thus, the relevant inquiry becomes whether Plaintiff has established that a genuine issue of fact exists as to the truthfulness of this reason or, instead, that another motivating factor for his termination is one or more of his protected characteristics. The Court finds that Plaintiff has not borne his burden at this level of the summary judgment inquiry. Significantly, the Court's role in evaluating the reason offered by FALMS for Plaintiff's termination is limited. Because Plaintiff was an "at will" employee, FALMS was free to discharge him at any time as long as the reason for his discharge

was not an unlawful one. Hence, the Court only considers whether a genuine issue of material fact exists with respect to FALMS' stated reason for Plaintiff's discharge within the confines of the legal framework developed for evaluating employment discrimination claims. Further, although Plaintiff vehemently denies the truth of the assertions that his former subordinate employees made about him to Williamson, the actual truthfulness of these statements is not for the Court, or the jury, to decide in connection with Plaintiff's discrimination claim. Rather, the inquiry is simply whether the persons who decided, on behalf of FALMS, to terminate Plaintiff had a good faith belief in the truthfulness of the information gained from the investigation of the complaint made against Plaintiff, and that it was that information that resulted in the termination decision.

Plaintiff attacks FALMS' termination decision on several grounds. He contends that the investigation was flawed, and that Williamson's and Ellison's notes regarding that investigation are not appropriately considered by the Court. He also maintains that Williamson, in particular, had discriminatory motives for concluding that he should be fired. Addressing the investigation of the complaint against Plaintiff first, the Court finds no triable issue with respect its legal adequacy. Plaintiff is correct that the notes from the investigation suggest a significant amount of gossiping was occurring amongst several of the persons interviewed by Williamson, and that Motes appears to be at the center of much of it. Nevertheless, Williamson's notes reflect that with each witness, she distinguished between first-hand information and

information that come from another employee or other employees. Further, with each of the four offenses attributed to Plaintiff in Williamson's notes and FALMS' EEOC response, Williamson received first-hand information from one or more employees about each.[10]

Nor does the fact that the first complaint to the Human Resources Department simply reported something that Jeter had heard was said by Plaintiff about another employee render the entire investigation defective. FALMS, as an employer, for both practical and legal reasons, must respond appropriately to such reports. When a second telephone call regarding the situation was received from the subject employee, Bourgeois, Williamson justifiably decided an investigation of the matter was warranted. Additionally, as discussed in connection with Plaintiff's

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[10]Williamson's September 3, 2004 letter to the EEOC states that the investigation of the complaint against Plaintiff revealed: (1) He encouraged one of his supervisors [Nancy Stroebel] to hire a less qualified candidate because of her appearance and the size of her breasts; (2) He made inappropriate comments to one of his male subordinates [David Motes] about other female employees in relation to their body parts; (3) He made derogatory comments in a staff [analysts] meeting about one of our female clients; (4) He madenumerous inappropriate, sexual comments to a female subordinate[Jodi Bourgeois] that made her, and others in Mr. Brauninger's department, extremely uncomfortable. See September 3, 2004 Williamson Letter to Charlotte Hokkanen, Investigator, Equal Employment Opportunity Commission, Exhibit 12 to Plaintiff's Opp. See also Williamson Investigation Notes, Exhibit 5A to FALMS' Mem., at page 7 (FALMS000232) (similarly listing the four reasons for termination decision).

motion to strike, that Williamson's investigation notes report a threat of litigation being made near the end of the investigation does not render Williamson's notes inadmissible, or otherwise diminish their significance to the Court's inquiry.

Plaintiff also repeatedly disputes the reliability of the investigation because, according to him, only employees who had been disciplined or demoted by him were considered, and that other "neutral"employees should have been interviewed. Although additional investigation efforts arguably may have been appropriate under the circumstances, including Plaintiff's apparently successful and previously complaint-free employment history, the Court cannot say that more employee interviews, or a longer, more in-depth interview of Plaintiff himself, were legally required. Again, as long as FALMS did not terminate Plaintiff for an unlawful reason, it was free to terminate him at any time for any reason. On the evidence obtained from the employees interviewed by Williamson and the three additional employees interviewed by Ellison, FALMS had a reasonable basis for deciding that Plaintiff's continued employment presented a risk of legal liability that FALMS did not want to bear any longer.

Furthermore, despite Plaintiff's assertions that other employees should have been interviewed, he has not identified any such employees by name, or offered affidavit or other testimony from them that supports the invalidity of FALMS' termination decision, in opposing FALMS' motion for summary judgment. Similarly, although Plaintiff criticizes FALMS' failure

to include an affidavit or other sworn testimony from Jodi Bourgeois regarding the allegations she made against him to Williamson and Ellison, Plaintiff bears the burden of proof at this stage of the Court's inquiry. If Plaintiff believes such testimony would somehow call the legal validity of FALMS' termination decision into question, it was for Plaintiff to obtain and put forth that testimony.

The Court likewise disagrees with Plaintiff's contention that Ellison's efforts in investigating the complaints against him were flawed because she did not conduct a second, comprehensive investigation completely independent of that conducted by Williamson. Rather, after talking with Plaintiff regarding his objections to Williamson's investigation and the resulting termination decision, Ellison undertook to address those objections by interviewing three additional witnesses and conducting a second interview of Jodi Bourgeois. Given that the results of these interviews were consistent with the information gathered by Williamson, Ellison determined that no further review or investigation was necessary. On the showing made, the Court finds no triable issue with respect to the reasonableness of Ellison's decision to proceed in this fashion.

Plaintiff additionally offers various vague assertions regarding Roniger's prior lack of awareness of any employee complaints against Plaintiff, and the extent of his involvement in the decision to terminate Plaintiff. The summary judgment evidence presented, however, does not reveal that the complaining employees' decisions to communicate those complaints

to the Human Resources Department, rather then the manager of the New Orleans office, present a triable issue with respect to FALMS' termination decision. Regarding Roniger's role in the termination decision, Williamson's and Ellison's declarations and investigation notes reveal that the termination decision was made by Williamson, Ellison, and Roniger. To the extent that Plaintiff may dispute the degree of Roniger's actual involvement in this decision, Plaintiff has not adequately articulated that position, its legal significance, or its evidentiary support in his opposition memorandum. FALMS' policy of utilizing progressive disciplinary measures likewise does not render Plaintiff's immediate termination suspect.

FALMS' "Corrective Action and Performance Improvement" document and its Employee Handbook clearly state that "physical and/or verbal sexual or other harassment of another individual" may subject an employee to "immediate termination.[11] Nor has Plaintiff presented evidence demonstrating that persons outside of his protected classes have been treated differently for the same or similar conduct.

Various additional facts pointed to by Plaintiff likewise do not establish a triable issue with respect to the truthfulness of FALMS' proffered rationale for Plaintiff's termination. Specifically, Plaintiff

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[11]See 8.14 Corrective Action and Performance Improvement at FALMS000221, Exhibit 11 to Plaintiff's Opp. (Rec. Doc. No. 70-16); The First American Way, An Employee Handbook, "Prohibited Conduct" at FALMS 000108, Exhibit 3 to FALMS' Mem.

emphasizes that approximately 80% of the employees in the FALMS New Orleans office were minorities, and that the number of white employees had declined. These numbers by themselves are not legally significant, particularly given that Plaintiff was just hired fourteen months earlier. On the showing made, the Court similarly declines to attribute legal significance to the fact that Williamson is or has been married to black man and an Hispanic man, and chose to share this information, and that she had children with these men, as part of an "icebreaker" exercise during a FALMS seminar occurring in the early days of Plaintiff's employment. Nor is the Court persuaded that Williamson's height or weight, or that she graduated from Baylor University, possibly played an impermissible role in her actions in connection with the investigation and Plaintiff's termination. The same is true with respect to Plaintiff's assertion that she raised her voice in an intimidating manner, and appeared angry, during their discussions occurring in connection with her investigation.

Finally, the Court recognizes that Plaintiff worked for 30 years with a number of female employees and minorities prior to being hired at FALMS without any sexual harassment complaints being made against him. Indeed, Plaintiff's references provided in connection with his employment application with FALMS, including one from his former female assistant, support the notion that Plaintiff was an effective and popular manager. In addition, during the time that he had been employed at FALMS, Plaintiff received a raise that was higher than usual. While of some relevance, this information is not

sufficient to create a genuine issue of material fact with respect to whether the persons terminating Plaintiff had a good faith basis for believing that Plaintiff had acted in a manner violative of FALMS' sexual harassment policy during the time that he was employed at FALMS, and acted based on those beliefs.

As the Court has previously stated, it is these questions, and not the actual truthfulness of the assertions made against Plaintiff by his subordinate employees, that are determinative of the success of Plaintiff's discrimination claims.

C. Defamation

Defamation "involves the invasion of a person's interest in his or her reputation and good name." Trentecosta v. Beck, 703 So. 2d 552, 559 (La. 1997). To prevail on a defamation claim, a plaintiff must establish: (1) a false and defamatory statement, (2) publication to a third party, (3) falsity, (4) fault (negligence or greater, including actual malice), and (5) resulting injury. Rouly v. Enserch Corp., 835 F.2d 1127, 1129 (5th Cir. 1988). "Language is defamatory when it tends to expose the plaintiff to contempt, hatred, ridicule or obloquy, or causes [him or her] to be shunned or avoided, or has a tendency to . . . injure [him or her] in [his or her] occupation." Martin v. Lincoln Gen'l Hosp., 588 So. 2d 1329, 1332 (La. App. 2 Cir. 1991), writ denied, 592 So. 2d 1329 (La. 1992). An employer can be held liable for an employee's defamatory statements if those statements are made in the course and scope of the employment. See, e.g., Rouly, 835 F.2d at 1131- 32; see also Lamonte v.

Premier Sales, Inc., 776 So. 2d 493, 498 (La. App. 5 Cir. 2000).

If made in good faith, communications occurring as part of an employer's investigation of an employee's alleged wrongdoing are treated as not being a "publication," or as being subject to a qualified privilege. See, e.g., Sears, Roebuck, and Co., v. Danny Williams Plumbing Co., Civil Action No. 98-2882, 1999 WL 280439, *4 (E.D. La. 5/4/99); see also Espree v. Tobacco Plus, Inc., 772 So. 2d 389, 391-92 (La. App. 3 Cir. 2000); Martin, 588 So. 2d at 1333-34. "Good faith" or a "lack of malice," in the context of defamation, means that the person making a statement honestly believes that it is true and has reasonable grounds for believing it to be true. Rouly, 835 F.2d at 1130; Martin, 588 So. 2d at 1333.

Plaintiff's analysis of his defamation claims against FALMS and Motes is extremely limited and, thus, not extremely helpful to the Court's consideration of these claims. The analysis that is offered appears to focus only on statements that allegedly caused, in whole or in part, his termination.[12] These statements fall into two categories.

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[12]See Plaintiff's Opp. at 18-20. Plaintiff's opposition memorandum does not discuss any defamatory statements allegedly made by Motes following Plaintiff's termination regarding the basis for that termination. Nor will the Court search all of the materials submitted by the parties to determine if any such statements exist.

The first category is statements allegedly made by Motes to other FALMS employees outside of the context of the investigation by Williamson and Ellison. The only evidence of such statements, however, is that found in Williamson's notes of her investigation.[13] Because he is a party to this action, Motes' account to Williamson of statements that he previously had made to other employees about Plaintiff, as reflected in the investigation notes, is admissible. See Fed. R. Evid. 801(d)(2) (admissions by a party). Statements to Williamson by other employees, such as Angelica Jeter, who are not parties to the lawsuit, however, regarding things Motes had told them on prior occasions, have not been demonstrated to be legally admissible within the confines of the hearsay rule. Thus, in the absence of an affidavit from Jeter and the other employees to whom Motes allegedly made these statements – declaring that Motes actually made the statements in question – the Court does not consider them as providing bases for Plaintiff's defamation claims.[14]

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[13]SeeWilliamson's May 4, 2004 investigative notes, Exhibit 5A to FALMS' Mem., and Exhibit A to Motes' Memorandum in Support of Defendant W. David Motes' Motion for Summary Judgment ("Motes Mem.").

[14]FALMS' discussion of Williamson's notes in its analysis of Plaintiff's discrimination claim focuses only on what the interviewees told Williamson that he or she personally had heard or observed Plaintiff say or do. The Court's analysis is likewise so limited. As previously explained, it is the fact that these words were spoken to Williamson, rather than the actual truth of those statements, that is relevant to the Court's evaluation of Plaintiff's discrimination claim. In the context of the defamation claim, there does not appear to be any dispute that, on May 3-4, 2004, certain employees told Williamson that Motes had told them things

The second category consists of statements that Motes allegedly made to Williamson as part of her investigation of the complaint lodged against Plaintiff. These statements are admissible as non-hearsay because Williamson heard them directly from Motes and not another employee, and they are offered by Plaintiff to establish that the words were spoken by Motes. Further, the statements likewise qualify as party admissions by Motes. See Fed. R. Evid. 801(d)(2). Given that Plaintiff's discussion of his defamation claims is limited to the issue of good faith/malice in the context of privilege, the Court will assume for purposes of these motions that all admissible, defamatory statements that have been alleged and are at issue were privileged if they were made in good faith by Motes.[15] Certain of these statements – particularly those regarding Plaintiff's alleged crude comments about numerous female employees' physical appearances and his corresponding desire to have sex with those employees – purportedly were told only to Motes in private conversations and are such that they likely were either largely true or not.

Plaintiff allegedly had said or done. In the absence of affidavits, declarations, or deposition testimony (or a demonstration of their legal unavailability) from those employees indicating whether or not Motes actually said those things to them, however, the Court, on the showing made, declines to consider those statements as potential factual bases of Plaintiff's defamation claims.

[15]If Plaintiff desired to have Motes' statements to employees other than Williamson analyzed differently, he could have included such an analysis in his opposition memorandum.

Plaintiff's and Motes' disagreement regarding the truthfulness of these statements, that is, whether Plaintiff in fact made these remarks to Motes, presents a credibility question as to Motes' good faith that the Court does not find appropriate to determine through a summary judgment motion.[16]

The Court is aware that Motes' motion also contests whether Plaintiff can satisfy the "defamatory statement" and "resulting injury" elements of his defamation claims. Considering the crudeness of certain of the statements attributed to Plaintiff, and that Plaintiff allegedly made them about several of the female employees that he either hired or directly

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[16]That the Court does not find summary judgment to be appropriate on this issue, however, is far from a prediction of success on the merits. In arguing the falsity and maliciousness of the allegations made against him by his former co-workers, Plaintiff points to uncontroverted evidence regarding his unblemished employment record prior to beginning work at FALMS, including a statement from his prior assistant, who is a female. On the other hand, Defendants point to Williamson's notes regarding statements allegedly made to her by Bourgeois and other FALMS employees. That Plaintiff had no history of sexual harassment complaints prior to commencing work at FALMS does not mean that the jury will not conclude that his behavior later changed, or simply that he never "got caught" at his previous job. Further, if the other co-workers testify consistently with Williamson's notes, and the jury chooses to believe that Plaintiff did make a hand gesture referring to a client's breasts in an analyst meeting, that Plaintiff made inappropriate comments to Nancy Stroebel and Kim Schroeder, and/or that Bourgeois is a more credible witness than Plaintiff, the jury may likewise decide that Plaintiff made some or all of the comments attributed to him by Motes, or at least that Motes had reasonable grounds for believing them to be true.

supervised, the Court believes that the jury reasonably could find Motes' alleged accusations to be extremely harmful to Plaintiff's reputation for good character and to his current and future employment. Further, the only evidence before the Court suggests that FALMS' termination decision rested on the "cumulative evidence" resulting from Williamson's and Ellison's inquiries. Given the foregoing, the Court likewise declines to dismiss Plaintiff's claims on the basis of the "defamatory statement" and "resulting injury" elements.

In its motion for summary judgment, FALMS additionally contends that it cannot be held vicariously liable, as Motes' employer, for comments allegedly made by Motes outside of the course and scope of his employment. The Court agrees. See, e.g., Trentecosta , 703 So. 2d 558 (for vicarious liability to be imposed defamatory statement must be in course and scope of employment); Lamonte, 776 So. 2d at 498 (same). The Court is not entirely convinced, however, that FALMS cannot be held vicariously liable for statements that Motes allegedly made to Williamson during the course of her investigation if Plaintiff demonstrates at trial that those statements were not made in good faith. Thus, the Court declines to grant summary judgment on this claim in FALMS' favor.

The Court realizes that, if Plaintiff meets this burden, Motes' behavior will be in the nature of intentional tort. Employers can be held vicariously liable, however, for such torts if the tortious conduct was "so closely connected in time, place, and causation to [the employee's] employment duties as to be

regarded a risk of harm fairly attributable to the employer's business, as compared with conduct motivated by purely personal considerations entirely extraneous to the employer's interests." Baumeister v. Plunkett, 673 So. 2d 994, 997-98 (La. 1996). In this instance, FALMS solicited the information provided by Motes as part of its investigation of another employee's complaint. It then decided, through employees Williamson, Ellison, and Roniger, that no further investigation of the matter was necessary and, based on all of the information obtained, including Motes's statements, that Plaintiff should be terminated. Given these facts, the Court cannot determine, on the showing made, that FALMS cannot be held vicariously liable as a matter of law for any actionable, defamatory statements made by Motes during the course of Williamson's investigation. Compare Baumeister, 673 So. 2d at 1000 (suggesting that sexual assault of a hospital patient by an employee charged with the duty of ensuring that patient's well-being, or sexual assault of subordinate employee ordered into the room by the tortfeasor-supervisor, or threatened her with the loss of her job, might be appropriate grounds for vicarious liability); Lebrane v. Lewis, 292 So. 2d 216, 218 (La. 1974) (vicarious liability imposed based on supervisor's stabbing of subordinate employee found to be "reasonably incidental" to supervisor's duties in connection with firing the employee and removing him from the premises).

CONCLUSION

As stated herein, the parties' motions to strike are granted in part and denied in part. Regarding the

motions for summary judgment, the Court finds, as to Plaintiff's discrimination claims, that no genuine issue of material fact exists and that FALMS is entitled to a judgment as a matter of law. As to Plaintiff's defamation claims, genuine issues of material fact exist regarding Motes' good faith and FALMS' vicarious liability. Thus, the motion for summary judgment filed by Defendant FALMS is granted in part and denied in part, and the motion for summary judgment filed by Defendant Motes is denied in its entirety.

New Orleans, Louisiana, this 22nd day of November 2006.

/s/Kurt D. Engelhardt
KURT D. ENGELHARDT
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ROY MICHAEL BRAUNINGER	CIVIL ACTION
VERSUS	NO. 05-0688
DEFAULT MANAGEMENT SOLUTIONS, L.L.C. AND DAVID MOTES	SECTION N (3)

ORDER AND REASONS

Presently before the Court is Defendant Motes' Motion to Reconsider Ruling Regarding Motion for Summary Judgment (Rec. Doc. No. 112). As stated herein, IT IS ORDERED that the motion is GRANTED. IT IS FURTHER ORDERED that Plaintiff's defamation claims against Defendant Motes and Defendant Default Management Solutions, L.L.C., d/b/a First American Loss Mitigation Services ("FALMS") are DISMISSED WITH PREJUDICE.

BACKGROUND

Plaintiff sued Defendant FALMS for race, gender, and age discrimination based on his termination from employment. Plaintiff also sued both FALMS and Defendant Motes for defamation. On November 22, 2006, the Court granted summary judgment in favor of FALMS with respect to Plaintiff's

discrimination claims. The Court denied summary judgment, however, with respect to Plaintiff's defamation claims against Motes and FALMS. See November 22, 2006 Order and Reasons (Rec. Doc. No. 111). Defendants now ask the Court to reconsider its rulings regarding Plaintiff's defamation claims.

ANALYSIS

Notwithstanding Plaintiff's arguments to the contrary, this Court is empowered to reconsider interlocutory orders such as denials of motions for summary judgment. See, e.g., Lavespere v. Niagara Mach. & Tool Works, Inc., 915 F.2d 167, 185 (5th Cir. 1999); Bourdais v. City of New Orleans, No. 99-1434, 2002 WL 1963320, *2-3 (E.D. La.) (Livaudais, J.); see also Fed. R. Civ. P. 54(b). The Court finds it appropriate to exercise that power here.

Defendants make several arguments in support of the motion to reconsider. Among these are the assertion that, under Louisiana law, absolutely no intra-corporate communication regarding an employment matter can ever satisfy the "publication" element of a defamation claim. Only now citing Quebedeaux v. Dow Chemical Company, 820 So.2d 542 (La. 2002), Defendants also argue, for the first time, that, for policy reasons, Louisiana's at-will employment doctrine precludes an employer's vicarious liability for intentional tort damages arising out of an employee's termination. Finally, Defendants point to the newly-offered declarations from Amy Williamson,

Richard Roniger, and Judy Ellison, stating that Plaintiff would have been fired even in the absence of statements made by Defendant Motes, in arguing that Plaintiff cannot establish the "resulting injury" element of his defamation claims.[1] Although not inclined to agree with their position regarding "publication," the Court does not find it necessary to address Defendants' arguments on that point or the Quebedeaux decision. Indeed, to avoid any confusion in future cases regarding these issues and the Court's treatment of them in this action, IT IS ORDERED that the portions of the November 22, 2006 Order and Reasons analyzing the "publication" element of Plaintiff's defamation claim and FALMS' potential vicarious liability for Motes' statements are VACATED. Rather, having considered the declarations of Amy Williamson, Richard Roniger, and Judy Ellison, together with the evidence previously submitted, the Court finds that Plaintiff has not demonstrated the existence of a genuine issue of material fact with respect to the "resulting injury" element of his defamation claim.

Although Plaintiff essentially argues that the issue of "resulting injury" is a credibility determination for the jury, he offers nothing to suggest that the uniform assertions of these three decision-makers regarding the significance of Motes' statements to

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[1]See Williamson, Ellison, and Roniger Declarations, Exhibits 1-3 to FALMS' Response to Defendant Motes' Motion to Reconsider Denial of Summary Judgment.

Williamson should be disbelieved.[2] Significantly, these assertions are not the type of statement that typically is susceptible to a "swearing match" that the trier of fact must adjudicate.

Further, as the Court noted in connection with Plaintiff's discrimination claim, Williamson's investigation notes reveal that she obtained first-hand statements by Nancy Stroebel regarding improper hiring practices by Plaintiff, first-hand employee statements regarding inappropriate and derogatory comments allegedly made by Plaintiff about a female client during an analysts meeting, and first-hand statements from Jodi Bourgeois regarding inappropriate sexual comments allegedly made to her by Plaintiff.[3] Ellison's notes and June 24, 2004 letter to Plaintiff reveal that her follow-up investigatory efforts primarily focused on confirming (with additional employees) the allegations of Plaintiff's statements during the meeting with the analysts, and that Plaintiff, not Motes or anyone else, had shared Plaintiff's personal information with Bourgeois.[4] She

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[2]In fact, it does not appear to the Court that Plaintiff has ever probed the basis for FALMS' termination decision by means of deposition or other discovery device. If such efforts have been made, no resulting evidence has been cited to the Court.

[3]See Williamson Declaration and Williamson Investigation Notes, Exhibits 5 and 5A to FALMS' Memorandum in Support of Motion for Summary Judgment ("FALMS Mem.") (Rec. Doc. No. 46-3).

[4]See Ellison July 31, 2006 Declaration, Ellison Investigation Notes (FALMS 000225), and Ellison June 24, 2004

also emphasized that the only evidence considered by the decision-makers was that based on first-hand information.[5] This evidence alone, without consideration of the statements made by Motes, provided sufficient justification for the FALMS decision-makers to have concluded that Plaintiff's at-will employment presented an unacceptable risk of legal liability, as well as an unacceptable working environment, and, thus, should be terminated. It likewise is sufficient to preclude a jury finding that Motes' statements, considered alone, were a substantial factor in bringing about Plaintiff's termination. Thus, neither defendant bears liability on Plaintiff's defamation claim.[6]

Letter, Exhibits 7, 7A, and 8 to FALMS' Mem. (Rec. Doc. No. 46-3).

[5]Although Plaintiff has objected to the results of Williamson's investigation on grounds that Defendant Motes allegedly made untrue statements about him in gossiping to and with other employees that were interviewed, Williams' investigative notes reveal that she carefully distinguished between first-hand information and second-hand information that was simply repeated by another employee.

[6]The Court's decision regarding the motion for reconsideration is not without some hesitation. All of the parties previously had ample opportunity to offer all necessary and appropriate argument and evidence in connection with the motions for summary judgment and should have done so. Nor have Defendants offered any explanation of why these declarations were not offered, and the Quebedeaux decision discussed, until after the Court had ruled on the original motions for summary judgment. Given that the motion for reconsideration addresses Plaintiff's only remaining claims, has merit, and will thus render a trial by jury unnecessary, the Court, in the interests of conserving the resources of the parties and the judiciary, nevertheless reviews the

CONCLUSION

Although the Court does not hold that decision-maker declarations of the sort provided by FALMS always will or should result in a summary judgment ruling favorable to a defamation defendant, they, when considered along with the other evidence, and the specific facts and arguments presented, do in this particular instance. Accordingly, for the reasons stated, the motion for reconsideration is granted, and Plaintiff's defamation claims are dismissed with prejudice.

New Orleans, Louisiana, this 16th day of January 2007.

/s/Kurt D. Engelhardt
KURT D. ENGELHARDT
UNITED STATES DISTRICT JUDGE

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motion. The parties and their counsel are strongly urged, however, that, in the future, all appropriate factual and legal arguments available should be made in connection with submission of the original motion for summary judgment. A motion for reconsideration is not to be viewed as a readily available "back up" plan for curing any briefing deficiencies of a motion for summary judgment or opposition memorandum.

APPENDIX D

Complaint of sexual harassment against Mike Brauninger 5/4/04
Investigator: Amy Williamson

On Wednesday, April 28th, Meredith contacted me in Santa Ana to tell me that Angelica Jeter from FALMS called and said a co-worker of hers may have been sexually harassed by Mike Brauninger, her manager. I advised Meredith to get all the information from Angelica and instructed her to find out who her co-worker was. Angelica did not release the name of her co-worker, so I told Meredith to document the situation in the event the co-worker came forward. (see Meredith's email dated 4/30/04)

On Friday, April 30th, Jodi Bougeouis called Allison from home and told her something she heard through Angelica. (see Allison's written documentation) The comment was so offensive, and based on the information we had at this point, we agreed it was necessary to visit the New Orleans office and conduct an investigation. Jodi remained at home the entire day, and we also advised her to stay home Monday (with pay) until we finished the investigation.

Rick Roniger was out of the office the entire week of May 3rd, so I used his office to interview employees. When I first arrived, I met with Mike Brauninger to tell him the reason for my visit, I told him we received a couple of complaints on him for making inappropriate, sexually-related comments, and that f would be investigating these complaints. He

immediately wanted to know who said what, and he wanted to know who was involved. He was unaware that Jodi was home because of this, so I advised him she was off as she didn't feel comfortable returning to work yet, which was why he saw her "holiday" pay pop up in her timesheet. I told him I didn't want to share any other information with him at that point because I didn't have all of the information yet. I promised him that we would meet at the end of that day to discuss. I also advised him not to discuss this matter with anyone.

Angelica Jeter:

The information Angelica provided was all information she heard from others. She never heard Mike say any of these things directly. I asked her to tell me exactly what she knew about Mike saying inappropriate things, and below are her various statements:

> The first incident I heard about was when they were hiring processors (Mike and Nancy Stroebel) Mike and Nancy interviewed one girl and while Nancy and David Motes were in his office, he said to them, "Did you see the boobs on that girl? How can I not hire her?" Nancy told me about this. David told Monique Simmns and Judy Lewis about it because Monique also mentioned this to me after it happened. Monique also told me about another applicant that Mike told David about. She was a nanny, and had no experience, but he told David, "How could I not hire her, she's so beautiful." Jodi Bougeouis told me about an incident with Mike in his office. He told her how he met his wife and told her about their sexual experience the

night they met. He told her about other sexual experiences when he was young. Jodi just listened because she didn't know how to respond. I think that happened sometime this year. I told Jodi to report it, but she never did. From what Jodi told me, Mike never asked Jodi directly about any of her sexual experiences. The most recent thing I heard was from Monique - - Monique heard it from Judy and Judy heard it from David. Mike told David that he wanted to fuck Jodi so bad that he could taste it. Monique told me this Wednesday, and I called Meredith about it. I told Jodi about this Thursday and suggested she go to HR. There was a rumor going on that Mike and Jodi were sleeping together. I heard that rumor from Monique and Judy. I also heard that recently in an Analyst meeting that Mike made a comment about the "bitch at RBMG with big boobs". He was telling the Analysts about him being kicked out of RBMG, and after the meeting, Judy told Monique and me about it. He said this in front of everyone in the meeting. Also, when employees get a PIP, everyone knows about it. Mike must tell some people and that's how it gets out. Jodi cailed me today from home and she said she felt uncomfortable coming back to work. She told me that she doesn't want to be at work if he's going to be here (Mike). Mike yells at all of us in front of each other. He confronts employees in the group, not individually in private. In a recent meeting, he started pointing at people and telling everyone what their mistakes were. He yelled at Debra Freeman,

> Nancy Stroebel, me, everyone. Another time, Monique left to take her kids to the doctor, and he asked her for a note from the doctor when she returned. She told Nancy that she would be late from lunch because of this. Mike yelled out so all could hear, What time did she sign in because I'm going to get her."

When Angelica and I finished the conversation, I clearly explained that this discussion must be kept confidential. I warned her that her name always came up related to spreading rumors and gossip and I told her we were very concerned about that. I advised her to stop talking about people, and if there's something wrong going on, she should only tell management or HR. She agreed.

On Thursday, May 6th, Jodi called me to tell me that Angelica approached her again and told her how sorry she was all of this happened. She went on to continue discussing the situation with Jodi, and Jodi was bothered by it. Since Angelica received a stem warning an 5/3 and 5/4 about not discussing the situation, Rick issued her a terminable PIP on 5/30 when he returned to the office.

Nancy Stroebel:

I asked Nancy to tell me about her experience with Mike Brauninger, and below are some of the comments she made:

> Jodi called me at home on Friday and told me she didn't feel comfortable coming to work because of something Mike said about her. Angelica told me she called HR abut it. Jodi said one time that Mike went into her cube and

asked her if she was "being bad". Another time she said Jodi told her that she went into Mike's office for help, and he replied with, "I can't help you, I'm married." He also told her about going to a club and getting with different girls, She felt uncomfortable with him. Jodi is timid and she's the kind of person that doesn't want to start trouble. I think that's why she never came forward. Jodi also said that she heard Mike made a comment to David Motes about wanting her. I haven't seen anything weird between Mike and Jodi first hand. When I first became a supervisor, we were interviewing processors. After one interview, he made the hand gesture pertaining to the woman's breasts. He wanted me to select her because she was attractive. There was another more qualified candidate, but Mike insisted on offering the job to the "nanny" because she was attractive and had large breasts. (I have copies of both candidates' resumes.) After we interviewed the "nanny", he told David Motes about her, Mike threatens us a lot. If production is down, he is stressing on us with all of us there in the same room. He reprimands us in public. The floor is so negative, and it starts in his office. He never has anything positive to say. He doesn't know his job, he's unprofessional, always negative. I don't think he's an effective manager, and I'm offended by some of the things he's said to me.

I asked Nancy again about the applicant to which Mike made an offer. I wanted to know what he specifically said about the hiring decision. Nancy said they both

interviewed the candidates, and this "nanny" didn't have the qualifications. He made the hand gesture about her breasts when she left. He said she was very attractive, and a very good candidate. She couldn't remember exactly what he said, but he made it clear that she was the one that would get the job. He called her and made her the offer but she declined. We are unclear as to why she turned down the offer. The other candidate was an order black lady with experience in collections. He made the hiring decision even though this candidate would be reporting to Nancy. At the end of our conversation, I advised Nancy not to share our conversation with anyone. I explained that this was a confidential investigation.

Monique Simms:

The information Monique provided was all information she heard from others. She never heard Mike say any of these things directly. I asked her to tell me exactly what she knew about Mike saying inappropriate things, and below are her various statements:

> Angelica told me what Mike was saying about Jodi. Judy Lewis told me that in the Analyst meeting last week, Mike referred to our contact at RBMG as a bitch with big boobs. David hears a lot of what Mike says, and David tells us. Mike told David he wanted to hire a girl with big boobs and blonde hair. Nancy, David and Judy tell me things that Mike says. I know he wants to have sex with Jodi because of some of the things he's told David. One day when I was late for lunch, I heard Mike was looking for reasons to fire me. One time he told me not to be friends with Angelica because she was bad news. He

> said if I ever told anyone he said that, he would deny it. It's like he knows I need my job and he holds it over my head. I know that Jodi told Angelica about sexual comments Mike made to her. Jodi told Angelica she was scared to say anything to anyone about it. I haven't heard Mike say these things directly. I just hear it from everyone else. David also told me that Mike said he liked me and Lee Lebeaud and wanted to have sex with us too.

Monique proceeded to tell me about all the rumors that she, David, Judy, Nancy and Angelica have passed back and forth about Mike. I warned her that this behavior had to stop. I told her that her name always came up when it was something about gossip. I also warned her that she should not share our conversation with anyone else.

The next person I spoke with was Lee Lebeaud, but before I was able to talk to Lee, Monique had already confronted her and told her about our conversation. I asked Monique to come back down and talk to me and I asked her why she did it. She said she felt she should tell Lee since she brought Lee's name into this. I explained that she woutd hear back from me before I left. On 5/4, I issued Monique a terminable PIP for discussing the investigation with her coworkers.

Lee Lebeaud:

The following are various comments Lee made about her experience with Mike Brauninger.

> At our Analyst meeting last week, Mike described the woman at RBMG. He made the hand motion and referred to her as the woman

with big boobs. I feel like if I told him it offended me, he would apologize and stop saying things like that. I heard that he wanted to have sex with a processor. Judy Lewis tofd me about it. Judy said David told her and Mike said it to David directly. The exact words were that he wanted to, "fuck Jodi so bad he could taste it." She also told me this comment got to Angelica and Angelica told Jodi about it. I know Angelica called HR. Jodi looked very upset Thursday after Angelica told her. She should've called HR herself. Other than that meeting, I've never heard Mike say anything inappropriate. There's a big problem with gossip around here. Judy and David always talk, Apparently, David hears everything and he tells Judy about it. Judy tells everyone from there. When I heard about Mike's comment about Jodi, I was shocked. It was so graphic. I can't believe no one told Rick. Judy also told me that Mike had said the same thing about me and Monique, but I've never noticed him staring at me or treating me differently. Mike always says there's an open door policy, but when I've gone to talk to him, people come back and laugh and seem to find out why I'm in there, Judy feels like Mike favors Jodi because of her big breasts. I don't know why she thinks that; I've never noticed it. Judy also told me that Mike made several passes at Jodi. I think Mike should've spent more time with the processors and anafysts to learn our jobs. He was so far removed from the process and he didn't understand our problems, so he was unable to tohelp us. I think he was in way over his head.

Kim Schroeder:

Kim was not involved in this incident, but we had lunch together so I asked her how things were going around there. She said she was having trouble with Mike Brauninger. I asked her 50 elaborate, and below are some of the things she said.

> I recalled him saying something very inappropriate when I first started, and I even made the comment in a joking manger that f would call HR. I can't remember exactly what he said to me, but since then, he hasn't ever said anything else to me. I don't think he's an effective manager and he is very unwilling to partner with me on crucial training issues. Several of his employees have confided in me, and they feel beaten up pretty bad and in a public way - in front of everyone else. I prepared the manuals far the processors and we called a meeting with them to introduce the manual. Mike was supposed to talk about it and lead the meeting. Instead, he started it and said something like, "Kim called this meeting, so here she is.." It was so unexpected. My observations are that he doesn't hold anyone accountable, and the thinks he has the knowledge and he thinks he's a good manager, but he's not. He's not well-respected around here. I'm very frustrated with him.

Judy Lewis:

The information Judy provided was mostly information she heard from others. I asked her to tell me exactly what she knew about Mike saying inappropriate things, and below are her various statements:

We had a meeting with Mike last Thursday, and he sat down and told us about all of the recent problems at RBMG. He said his words were misconstrued and referred to Kim Wells as the bitch with big boobs while he also made a hand motion. I talked to David about afterward because I was offended by the comment. I heard that the girls he was hiring were hat, had nice boobs, nice rack - comments like that he made to David and David told me. David told me about his conversations with Mike. David told me that Mike said he wanted to, "fuck Jodi so bad he could taste it." I don't know when he said it, but David told me about it last Thursday and I told Monique. I know there was another temp, Jennifer Whitmore, who's no longer here that Mike made a lot of comments about her breasts. Jodi appears to be Mike's favorite. She got the easiest job, the Direct Referral Clerk.

I stopped Judy because she was just telling me things she heard from David. I told Judy that I was concerned about her gossiping, and she said she didn't see anything wrong with it if all the information was true. I explained the damage it could cause and told her that she should stop doing it immediately. I also advised her that she should not share our conversation with anyone, I made it clear that she was receiving a warning, and if her name ever came up in the gossip arena again, she would receive further disciplinary action.

David Motes:

Below are comments made by David Motes regarding things Mike has said to him about women and other employees:

> Rick called me in his office Friday afternoon, and I thought it was about RBMG. He made me aware of the situation and told me you were coming to investigate. He felt he should tell me since I'm a big part of the investigation. I never told Rick about these comments before because I didn't think he would do anything about it, Nancy came into my office and asked me what she should do about Jodi. Jodi had called Nancy and told her about the comments Mike made about her. She said he never physically touched her. Nancy went on to tell him about the comments she head Mike say about an applicant and her big boobs. I told Nancy that Mike made a lot of those comments to me, but I didn't tell her anything else specific. In the Analyst meeting fast week, Mike really messed things up at RBMG, and he told us he couldn't go back. I asked him which person he dealt with, and he said the bitch with the big boobs. Following the meeting, I went to lunch with Judy Lewis and we were talking about what Mike said in the meeting, because Judy was upset about it, I remember when Mike interviewed Jodi, he made similar comments about her chest, her appearance, He wanted to be with her, and that's when he made the statement about wanting to "fuck her so bad he could taste it." He interviewed her, and right after the interview, he said that to me. He's also made

similar comments about Lee and Monique. There was another person he interviewed that was attractive and had large breasts, and after the interview he talked to me about her and said, "She's got the job." She was a "nanny", and I know he made an offer to her. Another person he hired, Jennifer, had a large chest also, and Mike made comments about her. Another time we were talking in my office, and Monique Simms walked by and he said she had a "nice ass". He also said, "I'd have to hit it" about Monique. He said several times that Nancy's ass was "smoking". I never encouraged it or started it, and t never elaborated or responded. It made me uncomfortable. He clearly had a fascination with Jodi. I lost respect for Mike a long time ago after Billy Price was in his office and started cussing out Mike. Mike took it and did nothing to Billy. I don't even think Rick knows about it. Mike was asking Billy about his time off, and Billy just went off on him. Mike has always thought I wanted his job because I did apply for it, but I know I will never get it. Rick told me that even if I had made it past you (HR), he would never consider me for it. I'm fine with that because I enjoy what I do now.

David stayed with me for over an hour, and he talked about a lot of things. He was very concerned about Mike and he was concerned about coming back to work to face Mike. He knew that Mike would know where some of the allegations came from, and he feared retribution. I assured him that wouldn't happen. I advised him to stop gossiping with Judy and others as it was contributing to the hostile environment on the

3rd floor. I made it clear that this was an official warning, and he should take it seriously. He understood. David called me on 5/5 to tell me that he was in the break room when Steve Johnson came in and said Mike had called him. David didn't ask for details but Steve went on to say that Mike told him he was going to "sue the shit out of everyone" up here that was involved.

Jodi Bourgeouis:

The following are comments Jodi made about her experiences with Mike:

> I always felt like he was flirting with me. He spoke to me differently than he spoke to the others. Several times he would come up behind me, touch my shoulders and say things like, "Are you being bad today?" It was really weird, and I never saw him do that to anyone else. About 2 months ago, I was in his office discussing a file, and out of the blue he asked me how long I had been married and how we met. I told him we met at a nightdub, and he said that was where he met his wife. He said every time he went into this club, he got laid. He said he met one girl from Houston one night and they had wild sex all night. He said she started coming every weekend to see him and they would have these wild sex weekends. He then said, "I better stop or you are going to report me to HR." She responded by saying she needed to get back to work. Right after that, he started acting differently toward me. He stopped being friendly, and he started treating me like he treated everyone else. I thought he changed

because I didn't respond in the way he had hoped. Around Christmas, my hair was long and I put curls in it. When I came into work, he told me I looked very sexy. When I cut my hair off, he said, "Women with short hair really do something for me." When I got glasses, he told me that women with glasses were sexy. There was always something. About 2 months ago, Mike called me in his office and somehow he started talking about age and wrinkles. He asked me how old I was, and I told him I would be 36 in June. He said he like women in their 30's and if he had the chance to be with a woman in her 20's or a woman in her 30's, he would take the 30 year old. About 3 different times, he told me not to hang around with Angelica because she was bad news. He said specifically, "She's a nigger lover and comes from a family of Mexican farmers. She's trash." He said he didn't want me hanging around her. He also told me that Angelica and Monique leave for lunch to look for men. He told me they went to the Ritz at lunch to find men. He told me she couldn't be trusted and that she would bring me down. I didn't tell anyone about it, and it upset me because Angelica never behaves that way. He's always very religious. He told me not to repeat it or he would just deny he ever said that. I'm very disturbed about the comment Mike made about me to David, and yes, I do believe Mike would say that based on the way he's talked to me in the past. Why would David make something like that up? If he had made it up, he would get in trouble for it. I've seen

similar behavior from Mike, and David wouldn't do anything to make things harder on himself, I think Mike is a liar. Nancy told me about his comments regarding an applicant and about his fascination with Jennifer and her big breasts. Mike has a temper, and he blows up at us in meetings. In a meeting 2 weeks ago, he accused all of us of chatting too much, he screamed at Debra Freeman and told her to stop talking to Angelica, he pointed at Kentrell and said she was always late, and he pointed at me and said I wasn't making my goal, he pointed at Nancy and said she wasn't making her goal. He constantly yells on the phone to his family. He has a very bad attitude, and I'm afraid of him. I don't feel safe, especially knowing what he said about me, and knowing his temperament. What if he came at me in the garage? He's going to be very angry that I've told you all of this. If he doesn't go, I'll have to quit. I can't work around him knowing how he feels about me. I talked to Wendy recently about moving to the call center so I could change my hours for my son's school. I also talked to Allison in HR and then talked with Mike about it. Mike told me to do what I needed to do; he said it would be ok. I feel like if Mike thought he could get away with it, he would make an advance toward me directly. I stay away from him at all costs, and I'm non-responsive when he starts talking about personal things. This last comment made me very mad; it's very upsetting to me. I also am upset by all the gossip on the 3rd flour. It's always the same people - David, Judy, Angelica,

Monique. I'm mad that David told them about Mike's comment about me. It's embarrassing.

Mike Brauninger:

I spoke to Mike Monday night, and our conversation began about 6:30pm and ended at 8:30pm. I went upstairs with the intentions of just asking him to stay at home Tuesday while I conducted the investigation, but he demanded to know everything I knew at that point so he could respond. I asked him to close his office down and follow me to Rick's office and I would get his statement. He was very angry, very hostile, and he was yelling at me. I asked him to calm down and we could discuss this calmly downstairs where none of his employees cauld hear him. I told him that there had been several complaints abut him making inappropriate comments in the workplace to several of his employees. He wanted to know who said what about him. I told him that to protect the confidentiality of others, I would try to leave off as many names as I could. I explained that this was an investigation, and I reminded him that retaliation was against the law, so I made sure he understood not to contact these employees directly. When I asked him what he said about RBMG in the Analyst meeting last week, he said he just told the Analysts what happened while he was there. I probed further, and asked him If he spoke of anyone in particular. He said that he did. He went on to say he did call her a bitch. I had to probe further before he finally admitted to making the hand gesture of someone with large breasts. He said he didn't say "boobs". I then asked him about conversations he had with David Motes. I asked him if he ever told him anything about Jodi, and he immediately said that

David was the one that made all of those comments about women, not him. I didn't even tell him what was said, he immediately piped in and accused David of saying degrading things about women. I asked him if he ever shared information regarding applicants with David, and he said no. I asked him about the interview he and Nancy had with the "nanny", and he said that the choice was Nancy's since these candidates would be reporting to her. He said he left all the decisions to Nancy and was not involved in anything except the interview. I asked him if he thought she was the most qualified candidate, and he said yes, but again reiterated it was Nancy's choice. I asked him who made the offer, and he said he did, I asked him what he said to Nancy about this candidate, and he couldn't remember. I asked him if he ever told Nancy to hire her based on her appearance, and he denied it. Again, he was still extremely hostile at this point. He then began asking me if I could see what was going on here. I asked him what he meant, and he proceeded to say that this was merely a conspiracy to get him out of FALMS. He said that David Motes did nothing but gossip and Nancy wasn't performing very well right now, and they were all mad at him because he came down hard on them. He said David was the one who made all of these comments. I asked him if all that was true, why hadn't he done something about it. He was speechless for a moment and replied saying he couldn't terminate the entire floor. I asked him again, that if all this was true about David, why hadn't he PIP'd him? No response. So I reminded him how wrong it was to tolerate those types of comments from his staff. By allowing these conversations to happen, he was showing tacit approval. He agreed. He still blamed it

all on David and Nancy. I then moved on to Jodi and asked him about conversations he had with her on a personal level. He denied ever saying anything to Jodi sexually. He denied ever telling her how sexy she looked. He basically denied everything I asked him, I asked him how she could possibly know about where he met his wife, and what reason would she have for making up these things? He said she was part of a conspiracy to get him out of FALMS, I asked him if he ever talked to Jodi or Monique about Angelica. He said no. He denied ever saying anything negative about her to Jodi or Monique, This conversation went on for 2 hours, and I told him to stay home tomorrow and cool off and I advised him that I would call him Tuesday to let him know what was going on.

After tying up some loose ends with Jodi, Nancy and David, I called Rick and Judy. We all agreed that Mike had caused a hostile work environment and we made the decision to terminate his employment, primarily for 4 reasons:

- Discriminatory hiring practices involving Nancy and an unqualified candidate
- Comments Mike made to his subordinate, David Motes
- Comments Mike made publicly in an Analyst meeting
- Comments and actions Mike made toward Jodi

Since it was clear there was a pattern of this type of behavior, and all those I interviewed were uncomfortable with his actions, and he clearly placed the company at risk, we felt we had no choice. I called Mike about 1pm on 5/4 and informed him that we were terminating his employment. He was very upset and

told me he thought I did a poor job because I was unable to see this conspiracy against him. I told him he would be receiving a letter from me with benefits information and instructions for an appeal if he felt it necessary.

Later that night, I received an email from Joe Cvelbar stating that Mike called him and told him he was fired for sexual harassment. He told Joe he was planning to sue. Joe told him nothing and notified Rick and me immediately. (see email) On Wednesday, 5/5, after receiving the call from David Motes about Mike contacting Steve, I called Mike. I told Mike that he should immediately stop contacting our employees about this matter. He said he was only telling them he enjoyed working with him. I told him that I knew he was saying more than that, and since he had also threatened to sue us, we could no longer discuss this matter with him. I also advised him that he was bringing employees into this that clearly had no involvement in this investigation, and it was causing employees to feel very awkward and uncomfortable. He said he understood and agreed to stop calling them. I reminded him that Rick would contact him when he was back in New Orleans to arrange a time to pick up his personal belongings. At that point, he thanked me for helping him throughout the last year, and he went on to tell me that after I called to terminate him the day before, the pains in his neck miraculously disappeared. I wished him the best of luck in future endeavors, and the call ended on a positive note.